

Decision D0082021 – Published in note form only

Re Boulter and Department of Local Government, Sport and Cultural Industries [2021] WAICmr 8

Date of Decision: 4 August 2021

Freedom of Information Act 1992 (WA): section 26

On 7 September 2020, Sandra Boulter (**the complainant**) applied to the Department of Local Government, Sport and Cultural Industries (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to all complaints made against a named employee of a particular local government agency. The documents included formal and informal complaints, together with the final outcomes for the complaints.

As the agency did not give the complainant a decision within the permitted period under the FOI Act, the complainant sought internal review of the agency's deemed decision to refuse her access to the requested documents. The agency subsequently did not provide the complainant with an internal review decision within the prescribed timeframe. Therefore, on 21 December 2020 the complainant applied to the Information Commissioner (**Commissioner**) for external review of the agency's deemed decision to refuse her access to documents.

On 23 December 2020 the agency provided the complainant with a decision and decided to give her access to an edited copy of documents as described in a schedule of documents. However, that access was deferred to allow for third parties to exercise their rights of review under the FOI Act. The agency gave the complainant access to an edited copy of the documents on 8 February 2021.

The complainant considered that additional documents should exist within the scope of her access application. In particular, the complainant considered that internal documents should exist showing the assessment and investigation carried out by the agency in dealing with the complaints, including where those matters had been referred to other bodies.

The Commissioner considered it was reasonable to expect that additional documents existed and the agency was required to carry out further searches. The agency was unable to identify any additional documents, but provided further information about how complaints were registered and the searches it had undertaken.

On 10 June 2021, after considering all the information before her, and taking into account the searches undertaken by the agency, the Commissioner provided the parties with her preliminary view. It was the Commissioner's preliminary view that the agency's decision to refuse the complainant access to documents pursuant to section 26 of the FOI Act was justified.

The complainant did not accept the Commissioner's preliminary view and made further submissions. After considering all the information before her, the Commissioner was not dissuaded from her preliminary view.

Section 26 of the FOI Act provides that an agency may refuse access to a document if all reasonable steps have been taken to locate the document, and it is satisfied that the document is either in the agency's possession but cannot be found, or does not exist.

The Commissioner considered that, in dealing with section 26, the following questions must be answered. First, whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. Where those questions are answered in the affirmative, the next question is whether the agency has taken all reasonable steps to locate those documents.

The Commissioner observed that an agency's decision to refuse access to documents under section 26 will be justified, even where there are reasonable grounds to believe additional documents exist or should exist, if the agency has taken all reasonable steps to find those documents.

The Commissioner observed that good record-keeping underpins the right of access to documents under the FOI Act. However, the Commissioner noted that it is not her role to examine in detail an agency's record-keeping practices, but rather to ensure that agencies are aware of their responsibilities under the FOI Act. That includes highlighting deficiencies in an agency's record-keeping practices that may impact upon the proper functioning of the FOI Act, where such deficiencies are uncovered in the course of an external review: see *Re Cox and Town of Claremont* [2009] WAICmr 36 at [33]. The Commissioner identified such deficiencies in this matter.

The Commissioner accepted that there were reasonable grounds to believe that additional documents exist or should exist within the scope of the complainant's access application. However, in light of the extensive searches undertaken by the agency and the explanations provided by the agency, the Commissioner was satisfied that the agency had taken all reasonable steps in the circumstances to locate documents within the scope of the complainant's access application and that additional documents either cannot be found or do not exist.

Accordingly, the Commissioner confirmed the agency's decision to refuse the complainant access to documents, pursuant to section 26 of the FOI Act, on the ground that those documents either cannot be found or do not exist.